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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF

**CISCO SYSTEMS, INC.'S OPPOSITION
TO ARISTA NETWORKS, INC.'S
MOTION TO STRIKE EXPERT
OPINIONS AND TESTIMONY OF DR.
JUDITH A. CHEVALIER**

REDACTED VERSION

Date: September 9, 2016
Time: 9:00 a.m.
Dep't: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Arista's Motion to Strike ("Motion") two of Dr. Chevalier's expert opinions should be
4 denied. *First*, Arista claims that Dr. Chevalier should not be permitted to provide her opinion with
5 regard to the disgorgement of Arista's profits for copyright infringement. Contrary to Arista's
6 claims, Dr. Chevalier does not have a "no apportionment" opinion with respect to the
7 disgorgement of Arista's profits. Instead, Dr. Chevalier correctly points out that it is Arista's
8 burden to prove any such apportionment. Dr. Chevalier then provides a critique of Arista's
9 expert's apportionment analysis and concludes that it does not result in any reasonable
10 approximation of a proper apportionment. This opinion is proper under 17 U.S.C. § 504(b) and
11 the controlling case law.

12 *Second*, Arista claims that Dr. Chevalier should be precluded from presenting the jury with
13 part of her lost-profits analysis, [REDACTED]

14 [REDACTED]
15 [REDACTED]. As an initial matter, Arista's allegations go to the weight of the
16 evidence and not to the admissibility of Dr. Chevalier's opinion. Prevailing case law makes it
17 clear that in this situation Arista's remedy is to cross-examine Dr. Chevalier at trial and to attempt
18 to present its own contrary evidence, not to exclude the opinion. Furthermore, the deposition
19 testimony relied on by Dr. Chevalier cannot be properly described as [REDACTED]

20 [REDACTED]
21 [REDACTED]. And, as
22 described below, Dr. Chevalier's lost-profits opinion is based on far more than just witness
23 testimony. The bases for her opinion include a market share analysis, an analysis of demand, a
24 capacity analysis, a determination of Cisco's incremental profit rate, and a magnitude of additional
25 evidence showing that [REDACTED]

26 [REDACTED]. Therefore, Arista's motion to preclude Dr. Chevalier's opinions should be denied.
27
28

1 **II. ARGUMENT**

2 **A. Dr. Chevalier's Opinion That Arista Has Failed to Meet Its Burden To**
 3 **Apportion Profits Is Proper And Should Be Admitted.**

4 Arista's Motion to strike Dr. Chevalier's so-called "no apportionment" opinion should be
 5 rejected because it is based on the false premise that Dr. Chevalier has an affirmative opinion
 6 apportioning 100% of Arista's profits to the infringing CLI, and it improperly seeks to preclude
 7 Dr. Chevalier from testifying that Arista failed to meet its burden to apportion profits. "In
 8 establishing the infringer's profits, the copyright owner is required to present proof only of the
 9 infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and
 10 the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b).
 11 Having calculated Arista's gross revenues in her Damages Expert Report and recognizing that it is
 12 Arista's burden to prove its expenses and apportion profits, Dr. Chevalier concludes: "[I]t is my
 13 opinion that Ms. Elsten has not presented a sufficiently reliable analysis to provide a reasonable
 14 approximation of the portion of Arista's profits attributable to its use of Cisco's copyrighted
 15 works." *See* Surrebuttal Report (Decl. of Elizabeth K. McCloskey, Dkt. 424, ("McCloskey
 16 Decl.") Ex. E at ¶ 5. Therefore, Dr. Chevalier calculates Arista's profits from its infringement
 17 without applying Ms. Elsten's apportionment factors. *See id.* at ¶ 57.

18 Contrary to Arista's assertions (Motion at 4), this is precisely the framework that Judge
 19 Alsup endorsed in *Oracle Am., Inc. v. Google, Inc.*, No. c 10-03561 WHA, 2016 WL 2342365
 20 (N.D. Cal. May 3, 2016). There, Judge Alsup permitted Oracle's expert, Malackowski, to present
 21 an opinion that is consistent with Dr. Chevalier's opinion here, ruling that Oracle need not offer an
 22 apportionment opinion at all and could rest on its expert's opinion regarding Google's revenues
 23 "in hopes that Google fails to carry its burden of demonstrating that further apportionment or
 24 expense deduction is appropriate." *Id.* at *7. Then, after Google offered its apportionment
 25 analysis, Oracle's expert, Malackowski, would be permitted to present "specific critiques
 26 of Google's own apportionment methodology and expense deductions (as well as his own further
 27 expense deductions)." *Id.* Judge Alsup acknowledged that this would require Oracle's expert to
 28 appear twice—*first*, to testify on Google's revenues, and *second*, to critique Google's

1 apportionment methodology and expense deductions. *Id.* Dr. Chevalier’s apportionment opinion
 2 is structured to follow precisely this framework. First, she sets out Arista’s revenues for the
 3 relevant time periods. Then, assuming *arguendo* that any of Arista’s apportionment opinion
 4 survives Cisco’s *Daubert* motion, Ms. Elsten will present that opinion. Afterwards, Dr. Chevalier
 5 will present her critique of Arista’s apportionment opinion.

6 Contrary to Arista’s implications, and in stark contrast to the portion of Malackowski’s
 7 opinion that was excluded by Judge Alsup, Dr. Chevalier does not offer her own apportionment
 8 methodology or opine that it is appropriate to apportion 100% of Arista’s profits to the CLI. *Cf.*
 9 *id.*, at *6 (noting Malackowski undertook his own affirmative apportionment analysis,
 10 “apportioned 100% of the profits attributable to the platform to the declaring code and SSO of 37
 11 APIs, and opined that Oracle could disgorge the full \$8.8 billion”). In fact, she readily
 12 acknowledges that [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED] Unlike Oracle’s expert, Dr. Chevalier has not
 18 engaged in the exercise of apportionment, except to the extent she has provided alternative
 19 calculations using Ms. Elsten’s general approach to apportionment with several corrections for
 20 some of the many flaws Dr. Chevalier identifies in Ms. Elsten’s approach.¹ Thus, Arista’s citation
 21 to *Oracle v. Google* for the uncontroversial proposition that “*to the extent [plaintiff] engages in*
 22 *the exercise of apportionment*, he must offer a methodology tied to the purpose of making a
 23 reasonable approximation of the profits attributable to the allegedly infringing elements,” is
 24 unavailing. *Oracle*, 2016 WL 2342365, at *7 (emphasis added).

25
 26
 27 ¹ Dr. Chevalier states: “[I]n the event that Ms. Elsten’s general apportionment methodology
 28 and/or her deducting of expenses are deemed sufficiently reliable for purposes of calculating
 Arista’s unjust enrichment, I have provided alternative calculations of Arista’s profits from its
 infringement using Ms. Elsten’s general approach, but correcting for certain flaws in her analysis
 discussed above.” Surrebuttal Report (McCloskey Decl. Ex. E) at ¶ 59.

1 Although case law does not require apportionment to be calculated with certainty, it does
 2 require that the apportionment be based on some rational, or reasonable, approximation. All of the
 3 cases cited by Arista are in accord. *See Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d
 4 826, 828-29 (9th Cir. 1985) (the court must conduct some apportionment of profits if the
 5 “evidence suggests some division which may rationally be used as a springboard”); *Guthy-Renker*
 6 *Corp. v. Bernstein*, 39 Fed. Appx. 584, 587 (9th Cir. 2002) (citing *Cream Records* to support
 7 apportionment of a damages award that linked the apportioned profits with the amount of time and
 8 space a photograph appeared on the screen in an infringing advertisement); *Abend v. MCA, Inc.*,
 9 863 F.2d 1465, 1480 (9th Cir. Cal 1988) (any apportionment must be “reasonable and just”);
 10 *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939) (same).

11 Here, Dr. Chevalier’s opinion is that Arista’s apportionment analysis is not “sufficiently
 12 reliable” to provide a “reasonable approximation of the portion of Arista’s profits that are
 13 attributable to its use of Cisco’s copyrighted works.” Surrebuttal Report (McCloskey Decl. Ex. E)
 14 at ¶ 57. Precluding Dr. Chevalier from presenting this opinion would be prejudicial to Cisco, as
 15 the jury could be provided with Arista’s inadequate apportionment opinion, but Dr. Chevalier
 16 would not be allowed to critique that opinion and explain to the jury why it is unreasonable and
 17 unreliable. Cisco must be allowed to present this opinion because the Ninth Circuit has made it
 18 clear that the jury does not have to accept the defendant’s expert’s apportionment opinion:
 19 “[A]ppportioning less than 100% of the profits but more than the percentage estimates of [the
 20 defendant’s] experts does not represent clear error,” so long as the jury is adequately instructed on
 21 the statutory burden of proof. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir.
 22 2000). Any uncertainty in determining the amount of the award should favor the plaintiff. *Frank*
 23 *Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989) (“In performing
 24 the apportionment, the benefit of the doubt must always be given to the plaintiff, not the
 25 defendant.”); *see Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939);
 26 *aff’d* at 309 U.S. 390, 406 (1940) (“We will not accept the experts’ testimony at its face value; we
 27 must make an award which by no possibility shall be too small. It is not our best guess that must
 28 prevail, but ***a figure which will favor the plaintiffs in every reasonable chance of error.***”)

(emphasis added). Thus, under the standard set by the Supreme Court and applied by the Ninth Circuit, if the jury finds that Arista has not met its burden “to prove [its] deductible expenses and the elements of profit attributable to factors other than the copyrighted work,” § 504(b), the jury can award Arista’s gross revenues “reasonably associated with the infringement” to Cisco. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 715 (9th Cir. 2004).

B. Dr. Chevalier’s “Scenario 3” Is Proper Expert Opinion and Should Not Be Excluded.

“An expert witness’s ‘testimony is admissible under Rule 702 if (1) the subject matter at issue is beyond the common knowledge of the average layman, (2) the witness has sufficient expertise, and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion.’” *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984) (citing *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997)). In her report, Dr. Chevalier presents three scenarios under which Cisco could recover its lost profits for Arista’s copyright infringement, all three of which satisfy these criteria. Arista moves to strike only the third scenario. Dr. Chevalier has the requisite expertise to present this opinion, the opinion involves a subject matter that is beyond the common knowledge of the average layman, and the opinion is based on analysis that is reasonable and reliable. For these reasons, Dr. Chevalier should not be precluded from presenting lost profits “Scenario 3.”

1. Dr. Chevalier’s analysis for “Scenario 3” relies on her specialized knowledge and expertise.

Consistent with Rule 702(a), Dr. Chevalier’s “Scenario 3” lost profits opinion should be admitted because it is based on “scientific, technical, or other specialized knowledge” and will help the trier of fact to understand “matters beyond the common knowledge of the average layperson.” *See also Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009). To formulate her “Scenario 3” lost profits opinions, Dr. Chevalier drew upon her extensive experience and expertise in economics, finance and market dynamics to analyze and interpret an extensive factual record in this case, to perform analyses of market demand, market share, market capacity, and to calculate

1 incremental profits and lost sales. Dr. Chevalier's expertise cannot reasonably be disputed,² and
 2 the fact that Arista's motion ignores Dr. Chevalier's market analyses and quantitative analyses
 3 does not mean they are not critical aspects of her opinion that will assist the jury.

4 **2. Dr. Chevalier's "Scenario 3" opinions are based on accepted and**
 5 **reliable methodologies.**

6 Contrary to Arista's claim that Dr. Chevalier's Scenario 3 opinion is not "expert
 7 testimony," Dr. Chevalier's analysis is comprised of several steps, each of which required her
 8 expertise and judgment and which are beyond the common knowledge of the average layperson.
 9 As discussed in the Chevalier Damages Report (McCloskey Decl. Ex. A at pp. 22-44), they
 10 include:

- 11 • An assessment of whether there is market demand for the accused copyrighted
works (Chevalier Damages Report (McCloskey Decl. Ex. A) at pp. 23-25);
- 12 • A qualitative assessment of the evidence regarding the proportion of sales that
Arista would not have made but for its copyright infringement (*id.* at pp. 16-21;
13 23-28; 41-42);
- 14 • A market share analysis to estimate Cisco's lost revenues during the period of
December 2011 through March 2016 that takes into account the portion of
15 Arista's sales that Cisco would have made but for Arista's infringement (*id.* at
pp. 23-25, 39-40);
- 16 • An analysis of Cisco's marketing and manufacturing capacity to make any
incremental sales but for the infringement (*id.* at pp. 28-29);
- 17 • Analysis of Cisco's incremental profit rate on the lost sales (*id.* at p. 40); and
- 18 • Calculation of Cisco's estimated lost profits (*id.* at pp. 40-42).

19 Each of these steps is the province of economic expertise and analysis, not "simple inferences
 20 drawn from uncomplicated facts." *Cf. In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551
 21 (S.D.N.Y. 2004) (precluding an expert from presenting a history of the company where "the
 22 glosses that [the expert] interpolates into his narrative are simple inferences drawn from
 23 uncomplicated facts that serve only to buttress plaintiffs' theory of the case"). While Dr.
 24 Chevalier must rely on the factual record in performing her "Scenario 3" analysis, unlike the cases

25 ² Dr. Chevalier is the William S. Beinecke Professor of Economics and Finance at the Yale
 26 University School of Management with a joint courtesy appointment at the Yale Department of
 27 Economics. She has an undergraduate degree in Economics from Yale University, a Ph.D. in
 28 Economics from the Massachusetts Institute of Technology and more than twenty years of
 experience in economics, finance and market dynamics as described in Exhibit 1 to her report.
 She is an Elected Fellow of the Econometric Society, among many other honors recognizing her
 achievements. *See* Exhibit 1 to Chevalier Damages Report (McCloskey Decl. Ex. A).

1 cited by Arista, Dr. Chevalier's "Scenario 3" opinion is based on economic expertise and analysis,
2 not a mere "factual narrative based on record evidence." *Cf. Highland Capital Mgmt., L.P. v.*
3 *Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005) (acknowledging that an expert may rely on
4 the facts or data of others, but precluding the expert from presenting testimony to the jury "solely
5 for the purpose of constructing a factual narrative based upon record evidence").

6 Although Arista attempts to discredit Dr. Chevalier's "Scenario 3" for not naming specific
7 customers (Motion at 5-7), Arista fails to cite a single case finding that a lost profits analysis must
8 name customers in order to be reliable. To the contrary, lost profits opinions are regularly based
9 on a market share approach, as Dr. Chevalier has done here, and market share approaches typically
10 rely on the plaintiff's but-for market share percentage, rather than identifying specific customers
11 who would have bought from the plaintiff in a but-for world. *See, e.g., State Indus, Inc.. v. Mor-*
12 *Flo Indus., In*, 883 F.2d 1573, 1578 (Fed. Cir. 1989) (where there are multiple competitors, a
13 market share analysis established the amount of lost sales with a "reasonable probability");
14 *Plantronics, Inc. v. Aliph, Inc.*, No. C 09-01714 WHA 2014 U.S. Dist. LEXIS 22405, 10-12 (N.D.
15 Cal. Feb. 21, 2014) (plaintiff's expert permitted to present a lost-profits opinion based on market
16 share). Although these cases relate to market share within the context of patent damages,
17 copyright cases often mirror patent cases regarding damages, and there is no reason that a market
18 share analysis would be any less reliable for the purpose of calculating lost profits for copyright
19 than it would be for patent. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 400-403
20 (1940) (adopting apportionment from patent law for copyright cases); *Jarvis v. K2 Inc.*, 486 F.3d
21 526, 533 (9th Cir. 2007) (actual damages calculated as what a willing buyer would have paid a
22 willing seller to use the copyrighted work, as a reasonable royalty would be calculated for patent
23 cases).

24 In her "Scenario 3" opinion, Dr. Chevalier draws on her economic expertise to employ
25 regularly accepted economic methods by relying on facts and data, such as Arista's and Cisco's
26 sales numbers, third-party research regarding market share and evidence in the form of documents
27 and sworn testimony, in order to prepare and support her analysis. Using these facts and data to
28 prepare separate analyses of demand, market share and capacity, as well as an assessment

1 regarding the sales that Cisco would have made but-for Arista's copyright infringement and
 2 calculations of those lost sales, as well as Cisco's incremental profit margins, are tasks that go
 3 well beyond the abilities or knowledge of the average layperson. Therefore, Dr. Chevalier's
 4 "Scenario 3" opinion, including the underlying facts and data points that were used in the
 5 preparation of her opinion, should not be excluded.

6 **3. Arista's challenge to Dr. Chevalier's "Scenario 3" opinion goes to the**
 7 **weight of the opinion, not to its admissibility.**

8 Arista claims that Dr. Chevalier's "Scenario 3" opinion [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 [REDACTED]. Arista is improperly invoking *Daubert* to resolve factual disputes about the
 14 interpretation and weight of hotly contested factual testimony, but such questions are for the jury
 15 and are not relevant to the admissibility of Dr. Chevalier's testimony. *See, e.g., Alaska Rent-A-*
 16 *Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969-970 (9th Cir. 2013) ("Basically, the judge
 17 is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely
 18 because they are impeachable. The district court is not tasked with deciding whether the expert is
 19 right or wrong, just whether his testimony has substance such that it would be helpful to a jury.").

20 The Ninth Circuit holds that the "test of reliability" for a testifying expert "is 'flexible.'...
 21 When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert
 22 may testify and the jury decides how much weight to give that testimony." *Primiano v. Cook*, 598
 23 F.3d 558, 564 (9th Cir. 2010). "Shaky but admissible evidence is to be attacked by cross
 24 examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.* at 564.
 25 "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the

26 ³ [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 jury must such testimony be excluded.” *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*,
2 No. C 03-1431 SBA, 2006 WL 1390416, at *3 (N.D. Cal. May 18, 2006). Here, Arista’s
3 criticisms of Dr. Chevalier’s reliance on specific evidence should be addressed by cross-
4 examination, not exclusion.

5 **4. Dr. Chevalier’s “Scenario 3” opinion is supported by the record.**

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 [REDACTED] However, to the extent that Arista continues to argue that Dr.
27 Chevalier’s opinion is based on [REDACTED], Arista’s remedy is to cross-examine
28 Dr. Chevalier at trial, to attempt to present its own contrary evidence, and to call its own witnesses

1 at trial, but not to exclude Dr. Chevalier's testimony. *See Primiano*, 598 F.3d at 564; *Alaska Rent-*
2 *A-Car*, 738 F.3d at 969-970.

3 Arista also contends that Dr. Chevalier's "Scenario 3" opinion should be excluded because

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] Motion at

7 6-7. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED] If Arista disagrees with Dr. Chevalier's approach and conclusions, it can seek to

25 impeach her at trial. *See Alaska Rent-A-Car*, 738 F.3d at 969-970.

26 **III. CONCLUSION**

27 For foregoing reasons, Arista's Motion should be DENIED.

28

1 Dated: August 19, 2016

Respectfully submitted,

2 /s/ John M. Neukom

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